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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-950

CLYDE W. REED - - - - - - Petitioner

versus

JEAN MOORE REED - - - - - Respondent

On Petition for Certiorari to the
Kentucky Court of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

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CLYDE W. REED - - - - - - *Petitioner*

v.

JEAN MOORE REED - - - - - *Respondent*

ON PETITION FOR CERTIORARI TO THE
KENTUCKY COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Did that part of the original divorce judgment of February 7, 1969, awarding respondent $25,000.00 per year for 10-½ years constitute a deprivation of petitioner's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments? (1a-4a *infra,* "Motion To Set Aside Portion of Judgment".)

2. Does an attempt to justify the award on KRS 403.065 violate the Fifth and Fourteenth Amendment? (3a, *infra.*)

STATEMENT OF THE CASE

A divorce judgment requiring (among other things) the petitioner (husband) to pay respondent (wife) the sum of $25,000.00 per year for 10-½ years was entered by the Marshall Circuit Court on February 7, 1969 (A. 46 of Petition). The petitioner appealed the judgment to the Kentucky Court of Appeals, where that part of the trial court's judgment awarding respondent $25,000.00 per year for 10-½ years was affirmed and rehearing denied on June 26, 1970 (A. 48 of Petition).

The petitioner, on January 28, 1971, filed a "Motion To Set Aside Portion Of Judgment" in the Marshall Circuit Court, contending that under an order of the circuit court dated August 7, 1970, the trial court had retained jurisdiction to alter, amend or set aside that portion of the judgment awarding the $25,000.00 annual payments; that under the opinion of the Kentucky Court of Appeals in the case styled *Colley* v. *Colley*, 460 S. W. 2d 821, the court had "repudiated its former claim of power to judicially repeal KRS 403.060". (1a-4a, *infra*.) The motion further contended that the February 7, 1969, judgment constituted ". . . a deprivation of Clyde's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments . . .", and asserted that, "An attempt to justify the award on KRS 403.065 would likewise violate the Fifth and Fourteenth Amendments . . ." (*ibid*). The petitioner filed two amended motions in the trial court without further mention of

constitutional provisions (5a-7a, *infra*). The trial court entered an order overruling petitioner's motion as amended, but made no ruling (or mention) therein on the constitutional contentions asserted in petitioner's original motion to set aside a portion of the judgment (A. 75-77 of Petition). On appeal of the trial court's order, the petitioner filed a "Statement of Points" (8a, *infra*) pursuant to Rule 75.04 of the Kentucky Rules of Civil Procedure.[1] It did not include any constitutional question as a point relied upon on the appeal.

Petitioner's brief in the Kentucky Court of Appeals did not raise any constitutional question (9a-18a, *infra*). Nor did his petition for rehearing filed in that court (19a-26a, *infra*).

The Kentucky Court of Appeals made no ruling on any constitutional question in affirming the trial court's order (A. 78-88 of Petition; 484 S. W. 2d 844).

ARGUMENT

The Petition For Certiorari Should be Denied Under Rule 19.1(a), Supreme Court Rules.

The respondent's Statement of the Case (pp. 2-3, *supra*) cites those portions of the record that establish beyond dispute the fact that no state court has "decided a federal question of substance" as this Court requires under its Rule 19.1(a) governing the grant or

[1] CR 75.04 provides, in part: "No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. . . ."

denial of certiorari. Although petitioner did "mention" Due Process and the Fifth and Fourteenth Amendments in his original motion to set aside a portion of the judgment, the trial court did not decide any federal question. On appeal from the trial court's order, the Kentucky Court of Appeals was not asked by the petitioner to decide any federal question, and it did not consider or decide any such action.

The petition should be denied under Rule 19.1(a) of the Supreme Court Rules because of the petitioner's failure to timely raise a federal question in the Kentucky Court of Appeals. *Wilson* v. *Cook*, 327 U. S. 474, 66 S. Ct. 663, 668; *Lear, Incorporated* v. *Adkins*, 395 U. S. 708, 89 S. Ct. 1902, 1913-14, 1916-17.

CONCLUSION

We respectfully suggest that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am a member of the bar of the United States Supreme Court; that I have entered my appearance as counsel for respondent in accordance with the rules; and that I have served 3 copies of the foregoing Brief For Respondent In Opposition upon Honorable John C. Lovett, Lovett and Lewis, Post Office Box 165, Benton, Kentucky 42025, said address being within 500 miles from that of the undersigned, by depositing same in the United States Post Office at Hopkinsville, Kentucky, first class, postage prepaid, on January ..., 1973 all in accordance with Rule 33(1) of the Rules of the United States Supreme Court.

Dated this 29 day of January, 1973

WILLIAM E. SCENT
KEITH, SCENT, KIRKHAM & WALTON
317 West 9th Street
Hopkinsville, Kentucky 42240

MARSHALL CIRCUIT COURT

Civil Action No. 2047

JEAN MOORE REED - - - - - - - *Plaintiff*

v.

CLYDE W. REED - - - - - - - *Defendant*

MOTION TO SET ASIDE PORTION OF JUDGMENT

Comes the defendant and moves the Court to set aside the following portion of the judgment of this Court entered on February 7, 1969:

> "Additionally, defendant shall pay to the plaintiff the sum of Twenty-Five Thousand ($25,000.00) Dollars a year for a period of ten and one-half (10 ½) years, each annual payment to be in a lump sum, the first of which shall begin one (1) year from the date of this judgment and continue from year to year on the same annual date thereafter with the last payment being for one-half (½) of such annual sum. The amounts represented by the deferred payments of alimony shall be payable absolutely except that in the event of the death of the wife during said period of time, any amounts that would have been due to be paid if she had lived shall be voided, and no amount shall be payable to her estate. In the event of the death of the husband during said ten and one-half year period of time, his estate shall be liable to pay to the wife in one lump sum, discounted at the rate of six (6) per cent per annum, any and all amounts remaining due and unpaid as of the date of the husband's

death. It is the intent of the Court that these deferred payments of alimony shall qualify under the Internal Revenue Laws to be tax deductible to the husband and taxable to the wife."

In support thereof, defendant states:

1. This motion is filed before the payment of February 7, 1971 is due or payable and is, therefore, timely.

2. This Court has jurisdiction to alter, amend or set aside the above quoted portion of said judgment. The Court retained jurisdiction for this purpose in its "Agreed Order and Satisfaction of Judgment" dated August 7, 1970 which provided:

> "This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; but this Court retains jurisdiction of the parties and of the subject matter of this action for any and all necessary and proper orders relative to the future alimony payments".

3. On November 27, 1970, the Court of Appeals rendered its opinion in *Theodore Thelmer Colley* v. *Helen Barrs Colley,* holding that an award of alimony to the wife violates KRS 403.060 unless (a) she does not have sufficient estate of her own and (b) she is sufficiently free from fault to warrant judicial finding that she is entitled to a divorce. (A copy of that opinion is attached hereto for the convenience of the Court). The Court of Appeals' mandate in that case was handed down on December 29, 1970 and the decision is now final. The Court of Appeals has thus repudiated its former claim of power to judicially repeal KRS 403.060.

4. In the instant case, the judicial finding that Jean was solely at fault has become final. It is manifest from

the record of the August 7, 1970 hearing that she now has "sufficient estate of her own". On both grounds the judgment awarding her alimony of $25,000.00 per year is unlawful and void and should be set aside.

5. The judgment of February 7, 1969 ordering Clyde to pay Jean $25,000.00 on February 7, 1971, and annually thereafter for 9½ years as "deferred alimony" violates KRS 403.060, is beyond the statutory power of the Court to award, and is unconstitutional and void. Said judgment constitutes a deprivation of Clyde's property by the State without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

6. The record shows that on August 7, 1970 Clyde paid Jean in cash the sum of $513,010.15, all except $47,663.85 being tax-free to her. It shows that on the same day she received unencumbered title to a lot in Murray, Kentucky valued at not less than $7,200.00. Her estate, prudently invested, will yield an income of approximately $35,000.00 per year without consuming the principal.

7. The award of $25,000.00 per year to Jean is not authorized by the restoration of property statute (KRS 403.065). This statute permits restoration to Jean only of property which Jean "obtained, directly or indirectly, from or through" Clyde during the marriage. It is beyond the statutory power of the Court to "restore" to Jean (by way of periodic alimony) property greatly in excess of that which she actually received from Clyde during the marriage. The courts possess no greater power to judicially rewrite the KRS 403.065 than to judicially repeal KRS 403.060. The judgment for $25,000.00 per year is unlawful and void and beyond the statutory power of the Court to award and should be set aside. An attempt to justify the award on KRS 403.065 would likewise violate the Fifth and Fourteenth Amendments to the U. S. Constitution.

8. The $25,000.00 per year award should be set aside on the further ground that it is manifestly so unfair and unjust as to amount to a travesty. To award a guilty wife $25,000.00 per year alimony when she already has an estate in excess of one-half million dollars, an annual income of about $35,000.00 and furs, jewelry and a Lincoln Continental automobile (all given to her by Clyde before the separation) is so grossly unfair as to shock the conscience.

Clyde W. Reed
By: John C. Lovett
Lovett & Lewis
Benton, Kentucky 42025

Raymond B. Dycus
Smithland, Kentucky 42081

NOTICE

Take notice that the foregoing MOTION TO SET ASIDE PORTION OF JUDGMENT will be brought on for hearing before the Hon. James M. Lassiter, Judge of the Marshall Circuit Court, at the Courthouse in Benton, Kentucky, on Friday, February 5, 1971, at 9:00 A.M. or as soon thereafter as counsel can be heard.

John C. Lovett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO SET ASIDE PORTION OF JUDGMENT and NOTICE were served upon William E. Scent, Esq., Reed, Scent and Walton, 621 Broadway, Paducah, Kentucky 42001, and upon L. M. Tipton Reed, Esq., Neely and Reed, Lawpart Building, Mayfield, Kentucky 42066, attorneys for Plaintiff, by mailing a true and correct copy thereof to them, by U. S. Mail, First Class, postage prepaid, on this the *28th* day of January, 1971.

AMENDED MOTION TO SET ASIDE PORTION OF JUDGMENT

Comes defendant and amends and supplements his motion to set aside portion of judgment, filed herein on January 28, 1971 in the following respects:

1. The defendant further moves the Court to vacate and set aside so much of the Court's "Final Order" dated August 7, 1970, filed August 7, 1970, as reads as follows:

"4. The plaintiff shall have further judgment against the defendant for the following amounts which shall be due and payable on the dates shown:

* * * * * *

(i) Annual alimony in the sum of $25,000.00 payable each year, the next payment being due and payable on the 7th day of February, 1971, and a like amount being due and payable on the 7th day of February 1972, 1973, 1974, 1975, 1976, 1977, 1978 and 1979 without interest, and a final payment of $12,500.00 being due and payable on February 7, 1980, without interest. If any installment is not paid when due six (6) per cent interest shall be due from date."

2. Since filing the motion on January 28, 1971, the decision of the Court of Appeals in *Colley* v. *Colley*, referred to in paragraph 3 of said motion, has been published and is reported in 460 S. W. (2d) 821, advance sheet No. 3.

Clyde W. Reed
By: John C. Lovett
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Benton, Kentucky

Raymond B. Dycus
Smithland, Kentucky

NOTICE

Take notice that the foregoing Motion to Set Aside Portion of Judgment, as amended, will be brought on for hearing before the Honorable James M. Lassiter, Judge of the Marshall Circuit Court, at the Courthouse in Benton, Kentucky on Friday, February 5, 1971 at 9:00 A.M. or as soon thereafter as counsel can be heard.

John C. Lovett

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amended Motion to Set Aside Portion of Judgment and Notice were served upon William E. Scent, Esq., Reed, Scent and Walton, 621 Broadway, Paducah, Kentucky 42001, and upon L. M. Tipton Reed, Esq., Neely and Reed, Lawpart Building, Mayfield, Kentucky 42066, attorneys for plaintiff, by mailing a true and correct copy thereof to them, by U. S. Mail, First Class, postage prepaid, on this the 3rd day of February, 1971.

John C. Lovett

Filed February 4, 1971.
W. J. Brien, Jr., Clerk.

SECOND AMENDMENT TO MOTION TO SET ASIDE PORTION OF JUDGMENT

For further ground for setting aside the portion of the judgment herein which has prospective application, defendant states:

1. Said judgment sought to be set aside has prospective application only, and in view of the decision in *Colley* v. *Colley,* rendered after entry of judgment, and the changes in circumstances which have occurred subsequent to entry of the judgment, it is no longer equitable that the judgment should have prospective application and, therefore, it should be set aside under CR 60.02(5). Moreover, the reasons cited in the motion are of an extraordinary nature justifying relief under CR 62.02(6).

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By: John C. Lovett
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Benton, Kentucky 42025

Raymond B. Dycus
Smithland, Kentucky 42081
Attorneys

NOTICE

Please take notice that the foregoing SECOND AMENDMENT TO MOTION TO SET ASIDE PORTION OF JUDGMENT will be submitted to the Hon. James M. Lassiter, Judge of the Marshal Circuit Court, at his office in Murray, Kentucky, on Monday, February 22, 1971.

John C. Lovett

Filed February 25, 1971.
W. J. Brien, Jr., Clerk

STATEMENT OF POINTS

The points to be relied upon by defendant on his appeal to the Court of Appeals are as follows:

1. The Chancellor, having retained jurisdiction of the parties and the subject matter "for any and all necessary or proper orders relating to future alimony payments", possessed jurisdiction to enter an order on defendant's motion to set aside or modify such award of alimony.

2. The Chancellor had jurisdiction under CR 60.02 to enter an order setting aside future alimony payments.

This the *25* day of *February*, 1971.

John C. Lovett
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Benton, Kentucky 42025

Raymond B. Dycus
Smithland, Kentucky 42081
Attorneys

COURT OF APPEALS OF KENTUCKY

File No. W-277-71

CLYDE W. REED - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - - *Appellee*

BRIEF FOR APPELLANT

STATEMENT OF THE FACTS

This appeal involves only the question of the Chancellor's jurisdiction to set aside a judgment for prospective application.

This is the second appeal in this case. The first appeal was docketed as Civil Action File No. S-73-69, and the decision of this Court is to be found in *Reed* v. *Reed*, Ky., 457 S. W. 2d 4 (1969).

On the prior appeal, this Court affirmed in part and reversed in part the Chancellor's judgment. (The Chancellor's original judgment is to be found at pages 1-32 of the Record). The mandate was issued June 26, 1970 and filed June 27, 1970 (R. 32, 33).

Thereafter, the Chancellor held a hearing to determine all steps necessary to comply with this mandate. This hearing was held on August 7, 1970, and a transcript of the proceedings at that hearing is attached to the record (R. 61). At this hearing, orders were entered confirming the satisfaction in full of the judgment, interest, penalties, etc., up to August 7, 1970, involving payment by Clyde to Jean of well over $500,000 (R. 54-57, 57-58, 59). Appellant's attorneys were instructed to draft "a formal order and

judgment in compliance with the agreement" and submit it to the court (Transcript of August 7, 1970 hearing, p. 47).

A draft was submitted. Appellant's counsel did not object. The Chancellor, however, prepared his own "Agreed Order and Satisfaction of Judgment", dated it as of August 7, 1970, and filed it November 6, 1970. It is to be found at pages 62 and 63 of the Record. This order recites that all payments then due (including the first annual $25,000 alimony) had been fully satisfied. It continued:

> "This cause is now stricken, settled in full, including satisfaction in full of the judgment, with the exception of said future alimony payments; *but this Court retains jurisdiction of the parties and of the subject matter of this action for any and all necessary and proper orders relating to the future alimony payments*" (R. 63). (Emphasis supplied.)

At that time, 9½ annual alimony installments of $25,000 each, remained to be paid, the next payment becoming due on February 7, 1971.

Three weeks later, this Court handed down its opinion in *Colley* v. *Colley*, Ky., 460 S. W. 2d 821 (1970). The mandate issued on December 29, 1970. This decision drastically changed the approach to matters of alimony and restoration of property in divorce cases.

Prior to the due date of the next $25,000 alimony payment, Appellant moved the Chancellor to vacate and set aside so much of the original judgment as ordered Clyde to pay $25,000 alimony per year for the next 9½ years (R. 75), and attached a copy of the *Colley* decision. He amended the motion after *Colley* was officially reported (R. 93-94), and amended it a second time to recite CR 60.02 as additional grounds for the Chancellor's jurisdic-

tion to grant relief (R. 96-97). Briefs were filed and the matter submitted without oral argument.

On February 23, 1971, the Chancellor entered his "Order on Motion and Amended Motion on (sic.) Defendant to Set Aside Portion of Judgment" (R. 102-105). He held that he had no "discretionary powers" to grant relief. He held that not even CR 60.02 gave him "jurisdiction to now use discretionary powers to alter or modify that final judgment and decision of the Court of Appeals" (R. 104). Evidently, he felt only the Court of Appeals possessed original jurisdiction to modify or amend the judgment he had entered. He said, "Obviously, a recourse may be had by appeal from his order to determine whether the Court of Appeals now desires to amend its own decision and to make the remaining deferred payments to (sic.) alimony subject to the rule which they later announced in the Colley decision" (R. 104).

This appeal followed.

The issue is simply one of jurisdiction. Did the Chancellor possess jurisdiction to pass on the merits of the motion to vacate the judgment as it applied to *future* alimony installments?

We submit that the Chancellor is vested with jurisdiction to pass on the merits of the motion.

ARGUMENT

I.

Having Specifically Retained Jurisdiction to Enter "Any and All Necessary and Proper Orders Relating to the Future Alimony Payments", the Chancellor's Jurisdiction is Clear.

Unless the quoted portion of the order which the Chancellor prepared and entered on February 23, 1971 is a nullity, the Chancellor possessed jurisdiction to pass on the merits of the motion.

"In considering whether jurisdiction exists to modify an award the situations categorize into two types: Where the decree itself reserves jurisdiction (whether based upon an agreement of the parties, or initially determined by the court), or, where the decree does not reserve jurisdiction. *The first type is clear, such decree may be modified.*" *Petrilli* 'Kentucky Family Law' (1969), page 414. (Emphasis supplied.) *Keach* v. *Keach*, 217 Ky. 723, 290 S. W. 708 (1927); *Boehmer* v. *Boehmer*, 259 Ky. 69, 82 S. W. 2d 199 (1935); *Parsons* v. *Parsons*, 26 Ky. L. Rep. 256, 80 S. W. 1187; *Pauley* v. *Pauley*, 280 Ky. 66, 132 S. W. 2d 512 (1939); *Staton* v. *Staton*, 164 Ky. 688, 176 S. W. 21 (1915); *Honaker* v. *Honaker*, 267 Ky. 129, 101 S. W. 2d 679 (1937); *Duff* v. *Duff*, 275 Ky. 367, 121 S. W. 2d 933 (1938); *Scott* v. *Robertson*, 212 Ky. 392, 279 S. W. 625 (1926); *Jones* v. *Jones*, 216 Ky. 810, 288 S. W. 737 (1926); *Turner* v. *Ewald*, 290 Ky. 833, 162 S. W. 2d 181, 188 (1942).

The rule is stated in *Keach* v. *Keach. supra*, as follows:

"The rule in this jurisdiction is that a judgment for alimony in a lump sum becomes final after adjournment of the term of court at which it is rendered, and cannot thereafter be modified *unless the court in its judgment retains the right to do so. Scott* v. *Robertson*, 212 Ky. 392, 279 S. W. 625. See, also, 19 C.J. §616, p. 269. And the same rule prevails where the payment is made in installments, if the judgment for alimony is a sum in gross. *Jones* v. *Jones*, 216 Ky. 810, 288 S. W. 737." (Emphasis supplied.)

II.

CR 60.02(5) and (6) Empower the Chancellor to Set Aside a Judgment Even After Affirmance by the Court of Appeals.

CR 60.02 provides:

> "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order or proceeding upon the following grounds: . . . (5) the judgment is void, or has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application;* or (6) any other reason of an extraordinary nature justifying relief."

This Rule confers on this Court complete power and jurisdiction to modify or set aside the prior judgment *insofar as it has prospective application.*

This authority exists even though the original judgment has been affirmed by the Court of Appeals.

In *National Electric Service Corp.* v. *District 50. UMW,* Ky., 279 S. W. 2d 808 (1955), the plaintiff had obtained a temporary injunction against the union's picketing. On appeal, the Court of Appeals affirmed. The injunction was made permanent. Later, the Supreme Court in another case issued an opinion that the jurisdiction of the NLRB in such matters was exclusive. Five months later the union moved to set aside the injunction under CR 60.02. Relief was granted by the Chancellor, and the company appealed. The question involved was: can the Chancellor, after an injunction is affirmed as the law of the case by the Court of Appeals, set the injunction aside? The Court of Appeals held that the Chancellor had jurisdiction under CR

60.02(5) to set it aside "for prospective application". The court said:

> "However, as we hope our rather long discussion of the question has demonstrated, neither of these contentions is an acceptable basis for a decision here and we must look again to CR 60.02 to determine if the court had the right to set aside its earlier judgment. We think he did have the right for two reasons: First, because subsection 5 of the above quoted rule permits such action when subsequent events justify relief from the operation of the judgment. Of this subsection, in Clay, CR, page 534, it is said:
>
> "'This ground had no counterpart in the Civil Code. However, it was substantially the basis of the ancient writ of audita querela. That writ and this ground are founded upon the right to relief when one is adversely affected by a judgment because of some defense, or discharge, or other circumstance arising subsequent to its entry.
>
> "'Relief from the judgment may not only be granted if it has been satisfied, released or discharged, but also if a prior judgment upon which it is based has been reversed or otherwise vacated, or if it would be inequitable to give it further prospective application.'
>
> *"The opinion in the Garner case which established law that had not been applicable in this Commonwealth prior to its decision, was certainly a circumstance arising subsequent to the entry of the judgment which warranted relief and we further believe it would be inequitable to give further prospective application to a principle of law which is no longer evidenced by the opinions of the state courts or the courts of the United States"* (p. 812). (Emphasis supplied.)

In *Cawood* v. *Cawood,* Ky., 329 S. W. 2d 569 (1959) a divorce judgment for the wife, awarding her $21,500 lump sum, was affirmed on appeal. Nearly a year after the judgment was entered and had been paid, she filed a motion under CR 60.02 to increase the lump sum because of newly discovered evidence (she had developed cancer). The Chancellor overruled the motion and she appealed. This Court affirmed on the ground that there was insufficient newly discovered evidence to warrant changing the lump sum award. The court added:

> "While CR 60.02 authorizes the setting aside of a judgment 'if it is no longer equitable that the judgment should have prospective application', we think it is clear that this ground relates only to such judgments as remain in whole or in part unenforced, and thus are capable of having 'prospective application' and does not apply to a judgment which has been satisfied in full" (p. 571).

Thus, it makes no difference that the original judgment was affirmed on appeal; the Chancellor possesses power to set it aside under CR 60.02 if it is on longer equitable that it have prospective application. This was reaffirmed in *Fortney* v. *Mahan,* Ky., 302 S. W. 2d 842 (1957). There the circuit court judgment settling an estate was affirmed by the Court of Appeals. After the mandate issued, Fortney filed a motion under CR 60.02 for relief from the judgment. As to the jurisdiction of the Chancellor to grant relief this Court said:

> "Direct attacks upon a judgment, as by appeal or by motion for new trial, are commonly accepted practice. *CR 60.02, in addition, provides the trial court with extensive power to correct a judgment even after recourse has been had to the usual methods of attack.*

> On motion, the Court is empowered to relieve a party from a final judgment under certain extraordinary circumstances and upon such terms as it deems just. CR 60.02 addresses itself to the sound discretion of the trial court" (p. 843). (Emphasis supplied.)

CR 60.02(5), according to Clay, codifies the ancient writ of *audita querela*. He said,

> "Relief may also be sought on this ground if a judgment has been satisfied, released or discharged, or if a prior judgment upon which it is based has been reversed or otherwise vacated, *or if for some reason it is no longer equitable that the judgment should have prospective application.* These grounds had no counterpart in the Civil Code. However, they are substantially the basis of the ancient writ of audita querela. That writ was founded upon the right to relief when one is adversely affected by a judgment because of some defense, or discharge, or other circumstance arising subsequent to its entry" (Clay, Kentucky Practice, Vol. 7. pp. 227-228). (Emphasis supplied.)

In *Taylor* v. *Mills*, Ky., 320 S. W. 2d 111 (1958) this Court acknowledged that CR 60.02 provided a remedy for relief from a final judgment in a case which had been before the Court of Appeals *four* previous times. It said:

> "It is true that CR 60.02 may provide a remedy for attacking a judgment even after there has been a final decision with respect thereto by the Court of Appeals. This was permitted under former Civil Code of Practice Section 518, which CR 60.02 supersedes (citing cases). However, no motion under CR 60.02 was made in the trial court, and we will not initially entertain such a motion" (p. 113).

And, in *Averitte* v. *Hutchinson,* Ky., 420 S. W. 2d 581 (1967) this Court, while it denied relief on plaintiff's CR 60.02 motion, approved the Chancellor's statement: "That the court has the right to act in behalf of the plaintiff in this matter is beyond question . . ." (p. 582).

In *Burke* v. *Burke,* Ky., 248 S. W. 2d 716 (1952) an award of $50.00 per month to the wife had been affirmed by the Court of Appeals (182 S. W. 2d 786). Five years later, the husband moved to modify this award. The Chancellor sustained the wife's demurrer. This Court said that the Chancellor erred. ". . . we think Mr. Burke's motion set forth sufficient grounds to warrant the granting of a hearing on his motion" (p. 716).

This Rule provides relief in criminal as well as civil cases. In *Balsley* v. *Commonwealth,* Ky., 428 S. W. 2d 614 (1968), Balsley, arrested for violation of parole from a life sentence, was surrendered to federal authorities for trial in Indiana for armed robbery where he was convicted and given a 10 year sentence. He filed a writ to set aside the life sentence in Kentucky on the ground that the surrender of his custody to federal authorities forfeited Kentucky's right to enforce completion of his life sentence. This Court, relying upon CR 60.02(5), set aside the remainder of the life sentence, saying that CR 60.02(5) preserves the remedies of *audita querela* which "may be directed against enforcement, or further enforcement, of a judgment which when rendered was just and unimpeachable". Accord: *Fanelli* v. *Commonwealth,* Ky., 423 S. W. 2d 255 (1968).

CONCLUSION

This brief deals only with the Chancellor's power or jurisdiction to pass on Appellant's motion to vacate the $25,000 per year award insofar as it requires *future* payments. It is not addressed to the merits of the motion. This Court has already declared that it "will not initially entertain" a motion under CR 60.02 (*Taylor* v. *Mills*, *supra*.)

We respectfully submit that on both grounds, i.e. the Chancellor's express retention of jurisdiction and the plenary power granted by CR 60.02, the Chancellor possessed jurisdiction to pass on the merits of defendant's motion.

Respectfully submitted,

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COURT OF APPEALS OF KENTUCKY

File No. W-277-71

CLYDE W. REED - - - - - - - *Appellant*

v.

JEAN MOORE REED - - - - - - *Appellee*

APPELLANT'S PETITION FOR REHEARING

STATEMENT

Appellant, Clyde W. Reed, petitions the Court for a rehearing of his appeal on the grounds (1) the Court has overlooked material facts in the record and has ignored the express terms of the law applicable to this appeal; (2) the Court in this case has simply *changed the law* to fit what evidently were preconceived ideas of this merits of this latest controversy between Clyde Reed and Jean Reed; and (3) the Court for the first time has denied a litigant hearing on the merits of his claim that "changes in circumstances" have made it "no longer equitable that the judgment should have prospective application" (R. 97), a claim on which Clyde is prepared to offer extensive and persuasive proof if given the opportunity.

Clyde has no delusions. He knows how difficult it is to view objectively and impartially *new* issues between him and Jean when *old* issues have been resolved in such an emotional and bitter atmosphere. Believing. however, that "great minds are never shut," he is confident that this Petition will be considered by judges who are not reluctant to permit the suggestion of appellate court error "to gambol freely on the cool green pastures of your mind."

ARGUMENT

I

The Court Has Amended CR 60.02(5) so as to Deny Clyde a Hearing

Clyde moved the trial court to vacate the judgment on the ground, among others, that changes in circumstances have made it "no longer equitable that the judgment have prospective application" (R. 97). He was prepared to introduce proof on this allegation—proof of changes in his and Jean's financial postures, proof of changes in the parties' conditions of health, proof of facts which would render simply unconscionable the requirement that he continue to pay Jean $25,000 per year for 9½ years, and proof that such requirement offends the most elementary concepts of justice. The lower Court overruled his motion on jurisdictional grounds alone. This appeal was addressed only to the jurisdictional issue. The *merits* were not briefed.

The Court has held that no matter how unjust or unconscionable the future payments, Clyde can have no hearing. No court on earth has jurisdiction to give him a hearing. His future obligations are as inexorable as the sunrise!

The Court reached this unusual result by two devices. First, without prior precedent, it amended CR 60.02(5) to read "prospective application *in an unlimited sense.*" When arose this judicial tendency to construe so elastically well-settled procedure rules? This Court strictly enforces its *own* rules. It dismissed Jean's original cross-appeal (claiming in excess of $2 million) simply because she did not comply with RCA 1.080 which required the timely filing of a $50.00 cost bond and statement of cross-appeal. It has dismissed a meritorious appeal because the record on appeal was filed 1 day late. But where broad equities are involved and manifest injustice is about to occur, this

Court amends CR 60.02(5) *for the first time* to deny Clyde a hearing.

Second, the Court seems to require an absolute showing of inequity *in advance,* otherwise no court has jurisdiction to hear proof on the inequity. It says, for example, that "there is no certainty" that Clyde will prevail, irrespective of quality or quantity of his proof that prospective application of the judgment would be grossly inequitable. A hearing will produce proof of such "certainty." It says, for further example, that "It is quite possible" that Clyde would not prevail at a hearing on the merits. This is a statement of the obvious. Is it a valid reason to deny him a *hearing?*

The Court assumed that Clyde's *only* ground for relief under CR 60.02(5) was the change in law effected by *Colley* v. *Colley,* Ky., 460 S. W. 2d 821 (1970). It said (again for the first time) that a subsequent change in the law would support relief under CR 60.02(5) only in "aggravated cases." This unprecedented holding ignores the other valid reasons Clyde had (and was prepared to prove) for seeking relief under CR 60.02(5).[1]

II

The Court Has Overlooked Material Facts in the Record

The dissenting opinion points out the failure of the majority to consider the fact that the trial court's "Agreed Order and Satisfaction of Judgment" was delivered to Appellee's counsel, reviewed by them, and unopposed by them. They never denied agreeing to the "Agreed Order" until

[1]The appeal in *Colley* probably was pending in this Court when Clyde's "Petition for Rehearing," strongly urging this Court to return to the rule of *law* (as it shortly did in *Colley*) was overruled. Thus, Clyde senses that this Court is willing to follow the law in all cases except his. And, in absence of an evidentiary hearing, how can the Court know that this is not such an "aggravated case"?

this appeal was filed. We will not further dwell on this, except to say that if Appellees' counsel had been displeased by the trial court's express retention of jurisdiction, they never expressed such displeasure in the eight months which elapsed between their receipt of the "Agreed Order" in November, 1970, and their response to this appeal.

The most serious misconception of the record involves the Court's viewing of the $25,000 annual payments as representing installment payments to Jean of her proportionate part of the "team" property.

The Chancellor regarded the payments as support and maintenance payments. He said "the Court feels that the wife is entitled to *lump sum alimony* in the amount of Five Hundred Thousand ($500,000) Dollars." Thus, the lump sum alimony (or alimony in gross) was fixed at $500,000. This Court has belatedly and erroneously construed the original judgment as awarding lump sum alimony of $765,500, with $500,000 being payable immediately and the balance payable in $25,000 annual installments. This is construction by afterthought.

The $25,000 annual payments possess all the characteristics of support payments. For example:

(a) "Alimony" (i.e. support for the wife) ceases with the wife's death. However, the wife's entitlement to her portion of *jointly-accumulated property* survives her. It passes to her estate. The judgment provides that "in the event of the death of the wife during said [10½ year] period, any amounts that would have been paid if she had lived shall be voided." This termination of the husband's liability at the wife's death is inconsistent with "alimony in gross."

(b) "Alimony" (support) is income taxable to the wife and deductible by the husband.[2] On the other hand, "in-

[2]If the wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this

(Footnote continued on following page.)

stallment payments discharging a part of an obligation the principal sum of which is . . . specified in the decree . . . shall not be treated as periodic payments" and are not income taxable to the wife nor deductible by the husband. Internal Revenue Code, 1954, as amended, Sec. 71(c)(1).[3] The trial court in the judgment stated,

> It is the intent of the Court that the $500,000.00 should be received by the wife without incurrence of tax liability thereon, and that the balance of the *alimony* payments specified shall meet the requirements of the Internal Revenue Code as to periodic payments and shall be tax deductible by the husband and taxable to the wife. (Emphasis supplied.)

The wife's liability for income taxes on the installment payments is inconsistent with "Alimony in gross."

As the dissenting opinion makes clear, both the trial court and this Court consistently referred to the annual installments as "alimony" and believed it to be such. To denominate them now as installment repayments of "team effort" property smacks of a *post hoc* rationalization of an antecedent opinion.

The Chancellor provided for payment of the commuted value of unpaid installments on Clyde's prior death. This, it will be argued, is not generally characteristic of "support and maintenance." However, the Chancellor has discretion to provide that the husband's obligation to "support and maintain" the wife survives his death and must be paid

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title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support and maintenance." Internal Revenue Code, 1954, as amended, Sec. 71(a)(3).

[3]The so-called "ten year rule" (IRC, 1954, Sec. 71(c)(2)) applies only if "the principal sum . . . is specified in the decree . . ."

out of his estate." *Wides* v. *Wides*, 300 Ky. 344, 188 S. W. 2d 471, 475 (1945); see also dissenting opinion of Judge Shackelford Miller in *Desjardins* v. *Desjardins*, 308 F. 2d 111, 119 (C.A. 6, 1962). Nor is it uncharacteristic of "support and maintenance" to require the husband to give security for future support and maintenance payments. The law expressly provides for it (KRS 403.080). And the fact that Clyde's obligation will continue after Jean's remarriage does not evidence that the installments represent alimony in gross. The general rule is that all support and maintenance payments, in absence of statute or contrary language in the decree, continue after the wife's remarriage, 24 Am. Jur. 2d, *Divorce and Separation*, Sec. 645, p. 765.

III

The Court Misconstrued the Chancellor's Retention of Jurisdiction

The majority writes that the trial court had no "procedural jurisdiction" to insert in the "Agreed Order" a retention of jurisdiction for subsequent orders relating to future alimony payments. It bases this conclusion upon the observation that the original February 7, 1969, judgment contained no such reservation and this judgment was affirmed on appeal. Here the Court simply overlooks well-settled law that for good cause shown future support and maintenance payments may be modified *at any time* by the Chancellor, whether or not he expressly reserves jurisdiction. A reservation of such right in the original judgment would have been superfluous. Can its omission be determinative of Clyde's plea for a hearing? Similarly, insertion of such reservation in this Court's affirmance of the February 7, 1969 judgment would have been superfluous. In such affirmance this Court regarded the $25,000 install-

ments as "alimony," i.e. support and maintenance.[4] The express retention of jurisdiction in the "Agreed Order," *an order prepared by the Chancellor himself*, simply made clear that the future $25,000 alimony payments were not final and irrevocable. Can it now be regarded as a nullity?

CONCLUSION

With all due respect, we submit that the Court has grossly erred. We reject the suggestions that minds are fixed, that *no* power on earth can change them, that because of the bitterness of past issues between Clyde and Jean, the Court has prejudged the merits of all future issues between them. Clyde's insistence that he has been wrongfully denied a hearing which this Court has not hesitated to grant to all other litigants similarly situated is not simply a churlish plea.

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[4]This Court called these payments "periodic alimony." When Judge Osborne's dissent asserted that the *law* permitted support and maintenance to the wife only on a divorce "obtained by her," a concurring opinion admitted that the Court had indeed awarded "alimony" where no statutory right existed. The concurring opinion rationalized such action:

> In the instant case, the appellant has argued that he is willing to pay substantial amounts *for the support of his wife*—the only issue is how much. An able and conscientious trial judge carefully and meticulously undertook to effect what he conceived to be a fair and equitable result under existing law. No abuse of discretion on his part is shown in this aspect of the case. [*Reed* v. *Reed*, Ky., 457 S. W. 2d 4, 11 (1969)].

Thus, in the original affirmance, this Court regarded the $25,000 installments as payments "for the support of his wife." It refused to budge from its position that as a court of equity it had the right to award "alimony" even though the statute did not permit it (a position it has since changed).

Now, the Court says that it *never* was "alimony"; it was a division of team property all the time!

A famous inscription on Langdell Hall, Harvard Law School, is relevant:

NON SUB HOMINE SED SUB DEO ET LEGE

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